APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 95-6261

RICHARD R. MUSE, *et al.*,
Plaintiffs-Appellants,

PATSY S. ADAMS, *et al.*,
Plaintiffs,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Kentucky
91-00122—Karl S. Forester, District Judge

December 26, 1996, Decided
December 26, 1996, Filed

Before: MARTIN, Chief Judge; CONTIE, Circuit Judge; CARR, District Judge.*

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* The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

BOYCE F. MARTIN, JR., Chief Judge. In this class action suit, plaintiffs appeal the district court's order granting their former employer's motion for summary judgment and dismissing their Employee Retirement Income Security Act claims with prejudice. Plaintiffs also appeal the district court's decision to deny their cross motion for summary judgment.

Plaintiffs retired from the Lexington, Kentucky site of International Business Machines Corporation pursuant to one of three voluntary early retirement programs offered by IBM from September 28, 1989, through March 31, 1990. The Voluntary Transition Payment Program, which we will follow the lead of parties and also call VTP-1, was offered on September 28, 1989, to IBM employees at four sites in the United States, including the Lexington site. Pursuant to VTP-1, eligible employees who terminated their employment prior to December 29 would receive one week of salary for every six months of service up to a maximum of fifty-two weeks of salary. On December 5, IBM offered the second Voluntary Transition Payment Program, which we will call VTP-2, to all IBM employees. Pursuant to VTP-2, eligible employees who terminated their employment after December 31, 1989 but before March 31, 1990, would receive the same benefits as those who accepted the VTP-1 program. Finally, on January 22, IBM offered the third Voluntary Transition Payment Program, a five-year pre-retirement leave of absence, which we will refer to as VTP/LOA. IBM extended the VTP/LOA to all IBM employees who were within five years of retirement eligibility and otherwise qualified for the VTP-1 and VTP-2 programs. VTP/LOA gave eligible employees who assumed leave status by March 31, 1990, the same benefits as those who accepted the VTP-1 and VTP-2 programs.

In the past, IBM had offered other early retirement programs to its employees whereby eligible employees re-

ceived a bonus of two weeks of salary for every six months of service up to a maximum bonus of 104 weeks salary, along with an additional payment of $25,000.00. The plaintiffs knew of these former arrangements. The plaintiffs allege that they inquired of their supervisors whether such a program would be offered to them in the future, and, based on their supervisors' negative response, accepted the VTP-1, VTP-2, or VTP/LOA plan.

On August 1, 1990, IBM offered its Lexington employees yet another program, the Lexington Transition Payment Program or LTPP. Pursuant to LTPP, eligible Lexington employees who departed from IBM between September 28 and December 31, 1990 would receive the full bonus plan offered in the past, being two weeks salary for each six months of service with a 104 week cap plus $25,000.00. This plan, which was offered only to employees at the Lexington plant, was adopted by IBM after the company made a decision to sell the Lexington plant to Clayton and Dublier, who required further downsizing.

On April 23, 1991, the plaintiffs sued IBM claiming five ERISA counts and five common law counts. On April 15, 1992, the district court certified the class and two sub-classes of plaintiffs and dismissed the plaintiffs' common law claims. Following extensive discovery, the parties filed cross-motions for summary judgment on November 30, 1993.

Plaintiffs allege that they would have chosen to participate in the superior benefit plan had IBM not negligently or intentionally misrepresented to the plaintiffs that no further early retirement plans would be offered. According to plaintiffs, IBM violated ERISA by breaching its fiduciary duty to plaintiffs; specifically, the plaintiffs claim that IBM was compelled to inform plaintiffs that the company was "seriously considering" the LTPP offer. In sum, plaintiffs argue that they should have been provided with more information to enable them to make more in-

formed decisions with respect to the financial consequences of their retirement.

In its answer, IBM challenged plaintiffs' standing, claiming that all three of the VTP eligibility periods preceded plaintiffs' claim. IBM maintained that its primary goal was to reduce the number of employees at the Lexington facility. According to IBM, its serious consideration of the LTPP offer did not begin until June 19, 1990; all it seriously considered before that date was the general concept of closing, selling, or downsizing the Lexington facility in order to accomplish its primary goal.

Pursuant to 28 U.S.C. § 636(b), the district court designated a magistrate judge to hear and prepare proposed findings of fact and a recommendation for the disposition of the cross motions for summary judgment. The magistrate judge determined that no reasonable trier of fact could conclude that IBM seriously considered offering LTPP to its Lexington employees before April 19, 1990, the date IBM began negotiations to sell the Lexington plant. According to the magistrate judge, IBM's fiduciary responsibilities arose on April 19 and not before that date. Consequently, the magistrate judge recommended that IBM's motion for summary judgment be granted and the plaintiffs' cross motion be denied.

Plaintiffs filed objections to the report and recommendation. They argued that the magistrate judge erred: first, by misapplying the law to the facts; second, by misinterpreting the concept of "serious consideration"; and third, by determining that the date of serious consideration was April 19, 1990. IBM filed a response to those objections. Reviewing the record, the district court made a de novo determination of these objections, overruled them, adopted the magistrate judge's recommendation, denied plaintiffs' motions for summary judgment, and granted IBM's motion for summary judgment.

We review grants of summary judgment de novo. The district court's order for summary judgment should stand

if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). *Southeastern Oakland County Resource Recovery Auth. v. Madison Heights*, 5 F.3d 166 (6th Cir. 1993).

Generally, employers have no fiduciary duty under ERISA regarding the adoption, modification, or termination of employee benefit plans. If, however, an employer gives serious consideration to implementing a second offering of severance plan benefits, it is well-settled that the employer has a fiduciary duty not to make misrepresentations to potential plan participants about the second offering. *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), cert. denied, 508 U.S. 940, 124 L. Ed. 2d 639, 113 S. Ct. 2416 (1993). The law is not well-developed, however, with respect to whether fiduciaries must disclose plan changes that have been proposed or considered but not yet adopted.

The plaintiffs claim that the district court passed over certain undisputed facts which show that IBM began seriously considering offering an enhanced benefit plan before the last plaintiffs left IBM on March 31, 1990. Those facts, plaintiffs argue, create a genuine issue of material fact which precludes the dismissal of their claims by summary judgment.

IBM responds to plaintiffs' claim by disputing what the facts show. According to IBM, the plaintiffs have produced no evidence to show that IBM's serious consideration of an enhanced plan began during the relevant period, that is, while plaintiffs were still debating the merits of the other plans. IBM suggests that case law and public policy compel a narrow interpretation of the term "serious consideration" which excludes the kind of internal deliberations which took place at IBM during the relevant period. *Drennan*, 977 F.2d at 251. The

company further maintains that summary judgment was the only proper disposition given that the record contains no evidence indicating that the LTPP plan was anything other than IBM's reaction to the unique event of the eventual sale of the Lexington facility to Clayton & Dubilier.

Any misrepresentations IBM made to the plaintiffs after it gave serious consideration to the implementation of an enhanced incentive plan could constitute a breach of its fiduciary duty under ERISA. *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988). However, misrepresentations made before serious consideration trigger no such duty. See *Swinney v. General Motors Corp.*, 46 F.3d 512, 520 (6th Cir. 1995) (quoting *Drennan*, 977 F.2d at 251). The critical question, therefore, is not whether IBM seriously considered offering the enhanced benefit plan but when the company seriously considered offering the plan.

In order to establish that IBM was subject to a fiduciary duty under ERISA, plaintiffs must establish that IBM seriously considered offering an enhanced benefit plan during the relevant period. Plaintiffs do not suggest a specific definition of the term "serious consideration," but argue only that the term is open-ended enough to encompass IBM's actions. Clear indicia of such consideration, they propose, are the studies IBM conducted and the November 1989 decision to take an accrual against 1989 earnings, allegedy based in part on those studies.

Until a plan is adopted, there is no plan, only the possibility of one. A fiduciary is therefore generally not required to disclose changes in a benefit plan before it is adopted. Congress' main purpose in imposing a disclosure requirement on ERISA fiduciaries was to ensure that "employees [would have] sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended." H.R. Rep. No. 533, 93d Cong., 2d Sess. VI (1974), reprinted in 1974 U.S.C.C.A.N. 4639. Insisting on disclosure during

the formulation of a plan and prior to its adoption would increase the likelihood of confusion on the part of beneficiaries. At the same time management would be unduly burdened by the continued uncertainty of what to disclose and when to disclose it. Moreover, any requirement of pre-adoption disclosure could impair the achievement of legitimate business goals. For example, if IBM had been forced to disclose prematurely the fact that it was studying the closing or selling of the Lexington site, which manufactured most of IBM's typewriters, the information could have been used by competitors to damage IBM seriously.

The exception of serious consideration does not apply until a company focuses on a particular plan for a particular purpose. An unique event, the sale of the Lexington plant, triggered the offering of the enhanced plan. Although the sale had been contemplated earlier along with other options for the Lexington plant, it was not until IBM made a definite decision to sell the Lexington plant and was told by the buyer that further downsizing was necessary that IBM focused on this particular plan for a particular purpose. *Swinney*, 46 F.3d at 520 ("changing circumstances . . . might require an employer to sweeten its severance package"). Here, there is no convincing evidence that suggests that IBM studied the possibility of enhanced benefit plans for any reason other than to gain a general appreciation of its options. Plaintiffs' concept of the term "serious consideration" is inconsistent with the ERISA goals of encouraging employers to offer welfare benefit plans and of minimizing the financial and administrative burdens on employers. *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 131 L. Ed. 2d 695, 115 S. Ct. 1671, 1677 (1995); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 158, 87 L. Ed. 2d 96, 105 S. Ct. 3085 (1985). This Court has also recently stated that "an employer should not be forever deterred from giving its employees a better deal merely because it did not clearly indicate to a previous

employee that a better deal might one day be proposed." *Swinney*, 46 F.3d at 520. Even if the plaintiffs had proved that IBM seriously considered the plan, they failed to prove that IBM breached its fiduciary duty under ERISA. Plaintiffs claim that IBM materially misrepresented facts concerning the incentive plan and failed to disclose the progress of its serious consideration to plaintiffs. The Supreme Court recently held that plan administrators who "participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense" fail to act "solely in the interest of the participants and beneficiaries," and violate the duty of loyalty in Section 404(a)(1) of ERISA. *Varity Corp. v. Howe*, —— U.S. ——, 116 S. Ct. 1065 (1996).

The record does not contain sufficient evidence to establish that IBM knowingly deceived plaintiffs about the possibility of an enhanced plan. The only suggestion of any improper behavior by IBM is the June 14, 1990, memo from an IBM employee warning against the enhanced plan because of the expected back-lash by the retirees covered by any of the three VTP plans. While it suggests that the employee knew the impact of IBM's actions, the memo in no way suggests that during the relevant time period the employee or IBM had engaged in a targeted plan to deceive the plaintiffs and thus reduce their benefits. In fact, the memo appears to show that the employee, if not IBM, had not previously contemplated the enhanced plan in any concrete fashion. Plaintiffs ask this court to reinstate their five common law claims either as federal ERISA common law claims or as state common law claims. In its broad preemption provision, ERISA provides that it "supersedes any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." § 514(a), 29 U.S.C. § 1144(a) (1988). The nature of ERISA preemption is not altered by the fact that some plaintiffs may be left without a meaningful remedy. *Tolton v. American*

Biodyne, Inc., 48 F.3d 937, 943 (6th Cir. 1995). State law claims based on an employer's alleged misrepresentations about the availability of a benefit plan are sufficiently "related to" an ERISA plan to be preempted by the statute. *Swinney*, 64 F.3d 512 (6th Cir. 1995).

Plaintiffs also contend that if their state law claims are preempted, those claims may be repackaged and saved as claims arising under federal common law. However, federal common law is developed under ERISA only in those instances in which ERISA is silent or ambiguous. *Flacche v. Sun Life Assurance Co.*, 958 F.2d 730, 735 (6th Cir. 1992). Plaintiffs' state law claims do not fall into that category; they seek to recover for conduct that falls within the purview of Section 404 of ERISA. Plaintiffs' common law claims are preempted by ERISA and cannot be reasserted as separate claims arising under federal common law.

Judgment AFFIRMED.

APPENDIX B

[Filed Sep. 5, 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 91-122

RICHARD R. MUSE, *et al.*,
Plaintiffs,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *et al.*,
Defendants.

OPINION AND ORDER

This matter is before the Court upon the parties cross-motions for summary judgment. The plaintiffs, former employees of the defendant, International Business Machines Corporation ("IBM"), who retired from IBM's Lexington facility pursuant to one of three early retirement programs offered by IBM from September 28, 1989 through March 31, 1990, allege that IBM violated certain fiduciary duties owed to them pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* Both parties have filed motions for summary judgment. The Court referred this action to the United States Magistrate Judge for consideration and recommendation pursuant to 28 U.S.C. § 636(b).

The Magistrate Judge filed his proposed findings of fact and recommendation on July 28, 1995. The factual findings made by the Magistrate Judge are as follows. In an effort to reduce the size of its workforce at the Lexington site, as well as other sites throughout the United States,

IBM offered several voluntary early retirement programs to its workforce. The first, the Voluntary Transition Payment Program ("VTP-1"), was offered on September 28, 1989 to IBM employees at four sites in the United States, including the Lexington site. Pursuant to VTP-1, eligible employees who terminated their employment prior to December 29, 1989 would receive one week of salary for every six months of service up to a maximum of fifty-two weeks of salary. Thereafter, on December 5, 1989, IBM offered the Voluntary Transition Payment Program ("VTP-2") to IBM employees company-wide. Pursuant to VTP-2, eligible employees who terminated their employment after December 31, 1989 but before March 31, 1990 would receive the same benefits as those who accepted the VTP-1 program. Finally, on January 22, 1990, IBM offered the Voluntary Transition Payment Program/Five-Year Pre-Retirement Leave of Absence ("VTP/LOA") to all IBM employees who were eligible for participation in VTP-1 and VTP-2 and were within five years of retirement eligibility. Pursuant to VTP/LOA, eligible employees who assumed leave status by March 31, 1990 would receive the same benefits as those who accepted the VTP-1 and VTP-2 programs.

Because the plaintiffs were aware that IBM had previously offered other early retirement programs to its employees at other sites throughout the United States whereby eligible employees received two weeks of salary for every six months of service up to a maximum salary of 104 weeks, along with an additional payment of $25,000.00, the plaintiffs allege that they inquired of their supervisors as to whether any such program would be offered to them in the future. Based on their supervisors' negative response, the plaintiffs accepted participation in the VTP-1, VTP-2, or VTP/LOA programs.

Thereafter, on August 1, 1990, IBM offered the Lexington Transition Payment Program ("LTPP") to its employees at the Lexington facility. Pursuant to LTPP, eligible employees who departed from IBM between Septem-

ber 1990 and December 1990 would receive two weeks of salary for each six months of service up to a maximum of 104 weeks of salary, along with an additional payment of $25,000.00. The basis of the plaintiffs' complaint is that had the defendants not negligently or intentionally misrepresented to the plaintiffs that no further early retirement programs would be offered, they would have chosen to wait to participate in LTPP and would have received substantially greater benefits. The plaintiffs further argue that IBM violated its fiduciary duty to the plaintiffs by failing to inform the plaintiffs that it was seriously considering offering the LTPP program. On the other hand, IBM argues that the plaintiffs lack standing to bring this action because their claim did not come into existence until July 12, 1990, which was well after the eligibility periods for the VTP-1, VTP-2, and VTP/LOA. Furthermore, IBM contends that although it was seriously considering the closure, sale, or downsizing of the Lexington facility during the eligibility periods of VTP-1, VTP-2, and VTP/LOA, and while it was seriously considering various programs to reduce the number of employees at the Lexington facility during the relevant periods, it did not seriously consider offering the LTPP program until June 19, 1990.

In fashioning his recommendation, the Magistrate Judge relied first on *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988). In *Berlin,* the Sixth Circuit Court of Appeals recognized the general principle that although an employer's decision to offer an ERISA plan is a nonfiduciary business decision, an employer's decision regarding the administration of an existing plan is fiduciary in nature. *Id.* at 1163. The plaintiffs in *Berlin* were management-level employees with the defendant, Michigan Bell Telephone Company ("MBT"). *Id.* at 1156. In an effort to reduce the number of management-level employees, MBT offered a program known as Management Income Protection Plan ("MIPP") from October 1, 1980 through December 1, 1980. *Id.* at 1157. Due to con-

tinued financial problems and a continued surplus of management-level employees, MBT again considered offering MIPP; however, this idea was consistently rejected due to cost. *Id.* at 1160. During this time, management level employees began inquiring about the possibility of future general MIPP programs. *Id.* at 1159-60. MBT responded, as late as May 18, 1982, by stating that MIPP would not be offered again. *Id.*

However, on June 11, 1982, MBT decided that MIPP would be implemented again and that a general MIPP offering would be made to management-level employees retiring between June 1, 1982 and July 31, 1982. *Id.* at 1160. Thereafter, the plaintiffs filed suit claiming ERISA violations based on MBT's representations that MIPP would not be offered again. *Id.* at 1156. The issue before the court was exactly when MBT concluded that MIPP would be offered again. According to the court, the record showed that management surplus and methods for work force reduction were discussed throughout the relevant period. *Id.* at 1159-60. Moreover, MIPP was discussed by MBT officials in a number of meetings, and consideration of MIPP by high-level managers commenced as early as March 1982. *Id.* Written cost-effectiveness studies were also undertaken on May 6, 1982 and May 20, 1982. *Id.* at 1160. Moreover, "[o]n June 1, 1982, a meeting was held at MBT to further design and discuss a MIPP offering, . . . and a recommendation was made that MIPP would be offered again." *Id.*

Although an employer's decision to offer an ERISA plan is a nonfiduciary business decision, the appellate court disagreed with the district court's conclusion that "any communications or representations made prior to such a decision were also nonfiduciary." *Id.* at 1163. Instead, the court held:

> [W]hen serious consideration was given by MBT to implementing MIPP by making a second offering (a question of material fact), then MBT as the plan

> administrator and/or . . . the plan fiduciary, had a fiduciary duty not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning the second offering.

Id. at 1163-64.

The Magistrate Judge also relied on *Drennan v. General Motors Corporation*, 977 F.2d 246 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2416 (1993). In *Drennan*, the plaintiffs, employees of the defendant, General Motors Corporation ("GM"), with ten or more years of seniority, were laid off when GM closed its plant in Norwood, Ohio in August, 1987 because of financial difficulties. *Id.* at 248. On September 15, 1987, GM notified the plaintiffs of their right to participate in the Supplemental Unemployment Plan Separation ("SUB") program. *Id.* Pursuant to SUB, eligible employees who participated in SUB were entitled to receive a lump sum. *Id.* At the same time, GM had another benefit plan in effect, the Voluntary Separation of Employment Program ("VTEP"). *Id.* VTEP was available to GM employees with ten or more years of seniority, and provided substantially enhanced benefits as compared to the benefits of SUB. *Id.* However, the collective bargaining agreement in effect at that time did not require GM to offer VTEP to the plaintiffs. *Id.*

After being laid off, but before agreeing to participate in SUB, the plaintiffs inquired of their supervisors about their right to participate in VTEP. *Id.* at 248-49. GM consistently denied that VTEP would become available to the plaintiffs. *Id.* Consequently, the plaintiffs chose to participate in SUB. *Id.* Thereafter, on April 12, 1988, GM announced that VTEP was being offered to all GM employees. *Id.* at 249. Because the plaintiffs had already accepted SUB, they were not allowed to participate in VTEP. *Id.* The plaintiffs filed suit claiming violations of ERISA based on GM's representations that VTEP would not be made available to them. *Id.* at 248.

The court found that although GM had consistently denied that VTEP would become available to the plaintiffs, GM had in fact been seriously considering offering VTEP to all its employees. *Id.* at 249. The court held that GM's serious consideration of VTEP triggered its fiduciary duties to "keep the Class and its members abreast of its consideration to permit their participation in VTEP so as to enable the Class members to arrive at a meaningful decision in selecting participation in an appropriate employee welfare benefit plan." *Id.* at 252.

Based on *Berlin* and *Drennan*, the Magistrate Judge next considered whether IBM gave serious consideration to offering LTPP to the employees at the Lexington facility during the eligibility periods for the VTP-1, VTP-2, and VTP/LOA programs (i.e. September 28, 1989 to March 31, 1990). Beginning in 1988, IBM began offering early retirement plans in an effort to reduce its workforce without violating its policy of not laying off employees. As early as March 1989, IBM was considering the sale, downsizing, or closure of the Lexington facility and recognized the need to reduce the number of employees at the Lexington facility. Although IBM recognized that VTP-1 would not sufficiently reduce the number of employees at the Lexington facility, it was offered to employees on September 28, 1989. In November 1989, as a means of further reducing the size of the workforce, IBM officials suggested offering an early retirement plan to employees at the Lexington facility with two times separation pay plus $25,000.00; that is, a program with benefits substantially similar to those in the LTPP program. At that time, the suggestion was rejected. By the first of December 1989, IBM had decided that the Lexington facility would be sold, not closed. Because IBM still desired to reduce the size of the workforce, VTP-2 and VTP/LOA were offered to employees at the Lexington facility on December 5, 1989 and January 22, 1990, respectively.

By the end of January, IBM had begun to seriously consider the sale of the Lexington facility, and on January 24, 1990, IBM's management committee gave authority to company officials to proceed toward a possible sale of the Lexington facility. In late February or early March, IBM came into contact with Clayton & Dubilier, the company which ultimately purchased the Lexington facility. As the result of negotiations, both IBM and Clayton & Dubilier agreed that the number of employees at the Lexington facility would have to be further reduced in order to successfully negotiate a sale. On April 19, 1990 Clayton & Dubilier made a presentation to IBM officials regarding its interest in purchasing the Lexington facility. As a result of Clayton & Dubilier's offer, IBM began considering several means for reducing its Lexington workforce in late April 1990. It was at this time that IBM began to seriously discuss what came to be known as LTPP. Discussions on this subject continued through May and into June 1990.

On June 19, 1990, an IBM task force decided that it would recommend LTPP to IBM's management committee. The task force further decided to recommend that LTPP not be retroactive to employees at the Lexington facility who had accepted one of the VTP programs. The management committee adopted the task force's recommendations on July 12, 1995, and LTPP was offered to employees at the Lexington facility on August 1, 1995.

Based on his factual findings and the relevant case law, the Magistrate Judge determined that "no reasonable trier of fact could conclude that IBM gave 'serious consideration' to offering LTPP to employees at the Lexington facility until April 19, 1990." According to the Magistrate Judge, it was at this time that IBM's duties under ERISA arose. Although IBM considered offering a benefit plan similar to LTPP as early as November 1989, the Magistrate Judge found that had Clayton & Dubilier not expressed an interest in purchasing the Lexington facility,

there is no evidence from which a reasonable trier of fact could conclude that IBM would have seriously considered offering LTPP to employees at the Lexington facility. Consequently, the Magistrate Judge determined that IBM had no duty towards the plaintiffs with regard to the offering of LTPP until April 19, 1990. Consequently, the Magistrate Judge recommended that IBM's motion for summary judgment be granted and the plaintiffs' motion for summary judgment be denied.

The plaintiffs filed objections to the report and recommendation on August 10, 1995. This Court must make a *de novo* determination of those portions of the Magistrate Judge's report and recommendation to which objection is made. 28 U.S.C. § 636(b)(1). First, the plaintiffs argue that the Magistrate Judge misapplied the controlling law to the facts. Relying on *Berlin* and *Drennan*, the plaintiffs argue that the Magistrate Judge improperly focused his analysis on determining when IBM, in concert with Clayton & Dubilier, gave serious consideration to making the final design of the LTPP plan available to its Lexington facility employees. The plaintiffs contend that the Magistrate Judge should have focused on when IBM gave serious consideration to making any plan available to its Lexington facility employees.

Second, the plaintiffs argue that the Magistrate Judge misinterpreted the serious consideration concept by hinging serious consideration upon a precise agreement between IBM and Clayton & Dubilier. According to the plaintiffs, neither *Berlin* nor *Drennan* indicate that serious consideration requires a meeting of the minds of two parties. Instead, the plaintiffs argue that it is only IBM's serious consideration of the plan that triggers IBM's fiduciary duties. The plaintiffs also contend that the Magistrate Judge misinterpreted the serious consideration concept by failing to grasp the progressive nature of serious consideration. By designating the commencement of negotiations between IBM and Clayton & Dubilier as deter-

minative of IBM's serious consideration, the plaintiffs argue that the Magistrate Judge ignored the fact that this event was a single occurrence in a connected series that began as early as March 1989.

Third, the plaintiffs argue that the proposed finding of fact concerning the date of serious consideration, April 19, 1990, is clearly erroneous. According to the plaintiffs, the issue is not when IBM began serious consideration of LTPP, but rather when it began serious consideration of making a financial assistance program" available to its Lexington facility employees. The plaintiffs also point out that by the summer of 1989, IBM had retained a consultant to perform certain studies. Based on the consultant's analysis, IBM determined that a reduction in the workforce through incentive plans would be necessary regardless of whether IBM closed, downsized, or sold its Lexington facility. As a result, VTP-1, VTP-2, and VTP/LOA were implemented. The plaintiffs contend that IBM knew in advance that these programs would not sufficiently reduce the size of the Lexington workforce and that additional programs would be necessary in the future. The plaintiffs further argue that models for the plan that was later dubbed LTPP were developed no later than early November 1989. Based on these objections, the plaintiffs argue that serious consideration of an incentive plan for the Lexington facility commenced in the fall of 1989.

The Court, having examined the record and having made a *de novo* determination on the record, is in agreement with the Magistrate Judge's proposed findings of fact and recommendation. Specifically, the Court agrees with the Magistrate Judge that IBM did not give serious consideration to offering LTPP, or any other financial assistance program, during the eligibility periods for VTP-1, VTP-2, and VTP/LOA. Simply because a plan similar to LTPP was being developed prior to April 19, 1990 does not necessarily mean that IBM was seriously

considering offering the plan to its employees at the Lexington facility. The Court rejects the plaintiffs' argument that the Magistrate Judge improperly hinged serious consideration on IBM's negotiations with Clayton & Dubilier. Although the Magistrate Judge determined that IBM did not seriously consider offering LTPP until the date Clayton & Dubilier offered to purchase the Lexington facility, the Magistrate Judge did not base this holding on any meeting of the minds between IBM and Clayton & Dubilier; rather, it was IBM's decision alone to seriously consider offering LTPP to its Lexington employees which was determinative. Moreover, the Magistrate Judge correctly set out the underlying facts and considered each fact in determining that IBM did not begin to seriously consider offering LTPP until April 19, 1990. Finally, the Court rejects the plaintiffs' argument that the Magistrate Judge's finding that IBM did not seriously consider offering LTPP to its Lexington employees until April 19, 1990 is clearly erroneous. The record indicates that although a plan similar to LTPP existed or was developed in 1989, IBM did not begin to seriously consider implementing LTPP, or any other financial assistance program, until April 1990. As there is no genuine issue of material fact for trial, the Court adopts the Magistrate Judge's recommendation.

Accordingly, the Court hereby ORDERS:

(1) the objections of the plaintiffs to the Magistrate Judge's report and recommendation [docket entry 198] are OVERRULED;

(2) the Magistrate Judge's report and recommendation [docket entry 197] is ADOPTED as and for the opinion of the Court;

(3) the plaintiffs' motions for summary judgment [docket entries 155 & 179] are DENIED;

(4) IBM's motion for summary judgment [docket entry 158] is GRANTED;

(5) IBM's motion for oral argument on the motion for summary judgment [docket entry 159] is DENIED; and

(6) a judgment will be entered contemporaneously with this opinion and order in favor of the defendants.

This 5th day of September, 1995.

/s/ Karl S. Forester
KARL S. FORESTER
Judge

[Filed Sep. 5, 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 91-122

RICHARD R. MUSE, *et al.*,
Plaintiffs,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *et al.*,
Defendants.

JUDGMENT

In accordance with the opinion and order entered contemporaneously with this judgment, the Court hereby ORDERS AND ADJUDGES:

(1) the complaint is DISMISSED WITH PREJUDICE, and judment is entered in favor of the defendants;

(2) this judgment is final and appealable, and no just cause for delay exists; and

(3) this matter is STRICKEN from the active docket.

This 5th day of September, 1995.

/s/ Karl S. Forester
KARL S. FORESTER
Judge

APPENDIX C

[Filed July 28, 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

Civil Action No. 91-122

RICHARD R. MUSE, *et al.*,
Plaintiffs,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *et al.*,
Defendants.

PROPOSED FINDINGS OF FACT AND RECOMMENDATION

I

The plaintiffs, by counsel, have filed a Motion for Summary Judgment, (DE 155, 189), to which the defendants, by counsel, have responded. (DE 183). The defendants, by counsel, have filed a Motion for Summary Judgment, (DE 158, 190, 194), to which the plaintiffs, by counsel, have responded. (DE 181, 193, 196). The Court has referred this action to the Magistrate Judge for consideration and recommendation pursuant to 28 U.S.C. Section 636(b). (DE 15).

II

The plaintiffs are former employees of the defendant, International Business Machines Corporation (IBM),[1]

[1] The other named defendants in this action are the plan administrators of the various early retirement programs offered to the

who retired pursuant to one of three early retirement programs offered by IBM from September 28, 1989, until March 31, 1990. All of the plaintiffs were employed at IBM's site in Lexington, Kentucky. The purpose for offering the programs was to reduce the number of persons employed by IBM at the Lexington site as well as other sites throughout the United States.

The first program, which was nominated as Voluntary Transition Payment Program [hereinafter referred to as VTP-1], was offered on September 28, 1989. This program was offered to employees at IBM's Lexington site as well as three other IBM sites throughout the United States. Eligibility for participation in this program was restricted to specific skill families at these sites, and seniority was to determine who would participate in the program if there was an oversubscription. Pursuant to this program, employees would have to terminate their employment before December 29, 1989, and each would receive one week of salary for every six months of service up to a maximum of fifty-two weeks of salary.

The second program, which was also nominated as Voluntary Transition Payment Program [hereinafter referred to as VTP-2], was offered on December 5, 1989. This program was offered company-wide to employees of IBM, and eligibility for the program was offered to a wider range of skill families than had VTP-1. While this program was also offered to employees at the Lexington site, those who had been eligible for participation in VTP-1, but did not participate in the program, were not eligible for participation in VTP-2. Pursuant to this program, employees would have to terminate their employment after December 31, 1989, but before March 31, 1990. Those accepting the VTP-2 program received the same salary package as those who accepted the VTP-1 program.

IBM employees at its Lexington site from September 28, 1989, until December 31, 1990. (*See* DE 1, 7).

The third program, which was nominated as Voluntary Transition Payment Program/Five-Year Pre-Retirement Leave of Absence [hereinafter referred to as VTP/LOA], was offered company-wide, and all employees who were eligible for participation in either VTP-1 or VTP-2, and who were within five years of retirement eligibility, were eligible to participate in this program. Pursuant to this program, employees would have to assume leave status by March 31, 1990. Those accepting the VTP/LOA program received the same salary package as those who accepted the VTP-1 and VTP-2 programs.[2]

The plaintiffs state that they were aware at the time each of these three programs was offered that other early retirement programs had been offered in the past to IBM employees at other sites throughout the United States. The plaintiffs state that these other programs provided for two weeks of salary for every six months of service up to a maximum salary of 104 weeks along with an additional payment of $25,000. Based on this knowledge, the plaintiffs state that they inquired of IBM supervisors whether any such program would be offered to them in the future. The plaintiffs' allege that the response which they received was "no." Based on this response, the plantiiffs accepted participation in one of the three programs being offered.

Subsequent to the plaintiffs' acceptance of participation in one of the three programs offered to them, IBM offered on August 1, 1990, a program nominated as Lextington Transition Payment Program (LTPP).[3] The purpose of this program was to reduce the work force at the Lexington site to accommodate its sale to a third party. This

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[2] In addition, those participating in the VTP/LOA program received during the five-year period service and earnings credit under the IBM Retirement Plan as well as medical and other benefits.

[3] This program also had a five year pre-retirement leave of absence feature.

program was restricted to certain skill families, and if the program was oversubscribed participation would be determined by seniority. Departure dates under this program were scheduled from September 28, 1990, until December 31, 1990. Employees accepted into this program received two weeks of salary for each six months of service up ot a maximum of 104 weeks of salary along with an additional payment of $25,000.

The plaintiffs argue that, but for the misrepresentations of IBM through its supervisors and literature, they would have continued their employment until the LTPP program was announced, and then retired pursuant to its terms. Obviously, those who retired pursuant to the LTPP program, as opposed to those who retired pursuant to the VTP-1, VTP-2, or VTP/LOA program, received an enhanced retirement package, including twice the salary and an additional $25,000.

The defendants respond that no misrepresentations occurred because of the fact that the purpose of the VTP-1, VTP-2, and VTP/LOA programs was separate and distinct from the purpose of the LTPP program. The defendants state that, on the one hand, the purpose of the VTP-1, VTP-2, and VTP/LOA programs was to reduce IBM's work force at selected sites, and that this decision was a unilateral one based solely on a corporate business decision. The defendants state that, on the other hand, but for the agreement to sell a part of the Lexington site, and the purchaser's request that the work force thereof be reduced, the LTPP program would not have been offered.

The plaintiffs have filed this action pursuant to the provisions of the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Sections 1001-1461. Under ERISA, IBM owed the plaintiffs certain fiduciary duties with regard to the offering of these early retirement programs. The plaintiffs claim that IBM violated those duties.

In support of its claim, the plaintiffs make two assertions. One, that, during the eligibility periods for the VTP-1, VTP-2, and the VTP/LOA programs, IBM negligently or intentionally misrepresented to the plaintiffs that no further early retirement programs would be offered when, at the time of such misrepresentation, IBM was seriously considering offering the LTPP program, which would provide substantially greater benefits to the plaintiffs than the VTP-1, VTP-2, and VTP/LOA programs. Two, that, during the eligibility periods for the VTP-1, VTP-2, and the VTP/LOA programs, IBM intentionally failed to provide the plaintiffs with information that it was seriously considering offering the LTPP program.

IBM responds that the plaintiffs are without standing to asert their claim because the LTPP program did not come into existence until July 12, 1990, which was well after the eligibility periods for the VTP-1, VTP-2, and the VTP/LOA programs. IBM further responds that, while it was seriously considering the closure, sale, or downsizing of the Lexington site during the eligibility periods for the VTP-1, VTP-2, and the VTP/LOA programs, and while it was seriously considering different programs to reduce the number of employees at the Lexington site during such eligibility periods, it did not seriously consider offering the LTPP program until June 19, 1990.

III

It is well established, and the parties acknowledge, that "[c]ompany management often wears two hats in the administration of company benefit plans." *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992). The parties further acknowledge that "[e]xisting precedent has recognized the distinction between an employer's prerogative to initiate discretionary policy decisions such as creating, amending, or terminating a particular plan as compared to its fiduciary responsibilities to administer

an existing plan for the benefit and interests of its participant-employees." *Id.* (citations omitted).

The parties, however, disagree as to where, in this action, the distinction between "discretionary policy decisions" on the one hand and "fiduciary responsibilities" on the other hand lies. In making this decision, the court must look to controlling authority in this judicial circuit, which consists of the opinions in *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988), and *Drennan v. General Motors Corp., supra.*

A

In *Berlin*, 858 F.2d 1154 (6th Cir. 1988), the plaintiffs were management-level employees with the defendant, Michigan Bell Telephone Company (MBT). MBT realized that, because of financial difficulties it was experiencing, it would have to reduce the number of management-level employees. On October 1, 1980, MBT officially adopted a program known as the Management Income Protection Plan (MIPP) as a means for reducing its number of management-level employees. MIPP was offered from October 1, 1980, to December 1, 1980.

Following December 1, 1980, MBT continued to experience financial problems, and continued to have a surplus of management-level employees. MBT considered again implementing MIPP as a means of reducing the surplus of management-level employees, but the idea was consistently rejected because it was a relatively costly means for reducing the surplus. While again implementing MIPP was consistently rejected, it continued to be an option available to MBT; that is, "MIPP remained effective . . . since (although not always implemented) MIPP was always a viable work force reduction alternative available to the company." *Id.* at 1157.

Also following December 1, 1980, management-level employees, "especially those considering retirement, [inquired] about the possibility of future general MIPP of-

fernigs." *Id.* at 1158. Officials of MBT responded to such inquiry by stating that the MIPP offering of October 1980 would not be offered again, and that management-level employees "considering retirement should not delay plans in anticipation of another MIPP offering." *Id.* Such representations were allegedly made by MBT officials as late as May 18, 1982. Consequently, the plaintiffs retired.

On June 11, 1982, it was decided at an executive meeting of MBT officials that MIPP would again be implemented. Specifically, it was decided that a general MIPP offering would be made to management-level employees retiring between June 1, 1982, and July 31, 1982. The plaintiffs subsequently filed suit claiming violations of ERISA based on MBT's representations that MIPP would not be offered again.

The parties agreed that it was "difficult to determine when MBT concluded that only a second MIPP offering would adequately alleviate the management surplus problem." *Id.* at 1160. The record, however, disclosed the following:

> [T]hat management surplus was discussed throughout the relevant period and that methods were discussed for work force reduction. MIPP was discussed in a number of meetings by MBT officials, and consideration of MIPP by high-level managers commenced as early as March 1982. Written cost-effectiveness studies were also undertaken, one of which was prepared on May 6, 1982, and another was prepared on May 20, 1982.

Id. The record further disclosed that, "[o]n June 1, 1982, a meeting was held at MBT to further design and discuss a MIPP offering, . . . and a recommendation was made that MIPP should be offered again." *Id.* This recommendation was subsequently approved by MBT's chief operating officer and president, and then presented

and approved by MBT's executive group on June 11, 1982. *See id.*

The *Berlin* Court acknowledged the general principle that an employer's decision to offer an ERISA plan is a nonfiduciary business decision, while an employer's decisions regarding the administration of an existing ERISA plan are fiduciary in nature. The court stated that, while MBT's "decision to offer MIPP benefits was a nonfiduciary business decision," it did not agree . . . that any comunications or representations made prior to such a decision were also nonfiduciary." *Id.* at 1163. The court wrote:

> On the contrary, we hold that when serious consideration was given by MBT to implementing MIPP by making a second offering (a question of material fact), then MBT as the plan administrator and/or . . . the plan fiduciary, had a fiduciary duty not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning the second offering.

Id. at 1163-64. Finding that the district court had not considered MBT's actions in light of these principles, the court remanded the case for further consideration consistent with its opinion.

B

In *Drennan*, 977 F.2d 246 (6th Cir. 1992), the plaintiffs were laid off employees of General Motors (GM) with ten or more years of seniority. The plaintiffs had been laid off in August, 1987, when GM, because of financial problems it was experiencing, closed its plant in Norwood, Ohio. On September 15, 1987, GM notified the plaintiffs of their right to participate in a benefit plan nominated as Supplemental Unemployment Plan Separation (SUB). This announcement was required by the collective bargaining agreement in effect at the time.

At this same time, GM had in effect another benefit plan, which was nominated as Voluntary Separation of Employment Program (VTEP). VTEP was available to GM employees with ten or more years of seniority, and provided substantially enhanced benefits as compared to those benefits provided by SUB. However, pursuant to the collective bargaining agreement in effect during this time, GM was not required to offer the VTEP to the plaintiffs.

After GM announced the layoff, but before agreeing to participate in SUB, the plaintiffs inquired of GM's Norwood plant management about their right to participate in VTEP, rather than SUB. Norwood plant management consistently denied that VTEP would become available to the plaintiffs. Based on this representation, the plaintiffs' agreed to participate in SUB. Subsequently, on April 12, 1988, GM announced that VTEP was being offered to all GM employees. The plaintiffs were not permitted to participate in VTEP because, by this point, they had all accepted SUB. The plaintiffs subsequently filed suit claiming violations of ERISA based on GM's representations that VTEP would not be made available to them.

"Although the Norwood plant management consistently denied that VTEP would become available to [the plaintiffs], GM management was, in fact, privately considering the option of their participation in VTEP." *Id.* at 248.

> GM's consideration of the Class participation in VTEP was initiated during November, 1986, when the plant closing was announced. Thereafter, during the ensuing months to April 12, 1988, when GM made a VTEP program available to GM employees with more than ten years of seniority upon application, GM management had, in fact, been seriously considering this ultimate action without disclosing the internal progress to those considerations to the Class.

Id. at 249.

"The district court found that GM had been seriously considering offering VTEP, which was superior to the SUB Buyout, to the Class before its members accepted the latter plan as a result of GM's misrepresentations." *Id.* at 250. The district court concluded that "GM had violated its fiduciary duty not to make either intentional or negligent misrepresentations concerning the availability of participation in the preferable VTEP plan." *Id.* The district court "also found that GM had 'misled the employees of the Norwood plant by not disclosing that a VTEP-type plan would be offered or even that the local management was pursuing such a plan.'" *Id.*

The *Drennan* Court, like the *Berlin* Court, began by acknowledging the legal difference between an employer's nonfiduciary, business decision to offer a plan as compared to an employer's fiduciary duties with regard to the administration of an existing plan and its participants. *Id.* at 251. Relying on the reasoning in *Berlin,* the *Drennan* Court wrote that "the duty to avoid material misrepresentations does not require the employer to predict an ultimate decision to offer a plan so long as it fairly discloses the progress of its serious consideration to make a plan available to affected employees." *Id.* The court further wrote that "[a] fiduciary must give complete and accurate information in response to participants' questions, a duty that does not require the fiduciary to disclose its internal deliberations . . . ." *Id.*

In affirming the district court's decision that GM had violated its fiduciary duties, the *Drennan* Court wrote:

> The district court's finding that GM had a VTEP-type plan for laidoff Norwood employees under "serious consideration" while it was conducting various management-Class meetings during September of 1987 is well-supported by the record. Not only was Class participation in VTEP under serious consideration during that time frame, but each rejection of the plan stimulated renewed interest and further manage-

ment explorations to make it available to the Class participants.

Id. at 246-47. The court pointed out that "it was GM's serious consideration of the plan . . . that triggered its fiduciary duties," and that "GM was impressed with a fiduciary duty to keep the Class and its members abreast of its consideration to permit their participation in VTEP so as to enable the Class members to arrive at a meaningful decision in selecting participation in an appropriate employee welfare benefit plan." *Id.* at 252.

C

Based on language in *Berlin* and *Drennan*, as well as language in *Swinney v. General Motors Corp.*, 46 F.3d 512 (6th Cir. 1995), the Magistrate Judge finds that, whether LTPP is termed an "existing" plan and "amendment" to an existing plan, or a "prospective" plan is immaterial. *See Drennan*, 977 F.2d at 251; *Swinney*, 46 F.3d at 521 n.4. Rather, based on *Berlin* and *Drennan*, as well as *Swinney*, the Magistrate Judge finds the initial inquiry to be whether, during the eligibility periods for the VTP-1, VTP-2, and the VTP/LOA programs (i.e. September 28, 1989, to March 31, 1990), IBM gave "serious consideration" to offering LTPP to the employees at its Lexington site. The Magistrate Judge addresses this issue below.

D

During the years 1988 through 1990, IBM was attempting to reduce its expenses by reducing its employees. IBM, however, maintained a policy of not laying off employees, and, therefore, began offering early retirement programs. Initially, these programs were limited to employees at specific IBM facilities, but by late 1989 and early 1990 IBM began offering such programs to employees at all of its facilities.

As early as March 1989, IBM was considering the sale, downsizing, or closure of its Lexington facility, and had

recognized the need to reduce the number of employees at the Lexington facility in either event. On September 28, 1989, IBM offered VTP-1 to employees at its Lexington facility. IBM knew before offering VTP-1 that such program would not sufficiently reduce the number of employees at its Lexington facility. Consequently, IBM continued to consider the sale, downsizing, or closure of its Lexington facility, as well as various means by which it could further reduce the number of employees at its Lexington facility. At least by November 1989, one of the various means mentioned by IBM officials for reducing the number of employees at the Lexington facility was an early retirement program offering two times separation pay plus $25,000.00; that is, a program which would offer benefits similar to those ultimately offered by LTPP.

By the first of December 1989, however, IBM had decided that its Lexington facility would not be closed, and that a purchaser would be sought. IBM still was concerned with reducing the number of employees at its Lexington facility, and on December 5, 1989, offered VTP-2 to the employees at its Lexington facility. Apparently still concerned with reducing the number of employees at it Lexington facility, IBM, on January 22, 1990, offered VTP/LOA to employees at its Lexington facility.

By the end of January 1990, IBM had begun seriously considering the sale of its Lexington facility. In fact, on January 24, 1990, IBM's management committee gave authority to company officials to proceed toward a possible sale of its Lexington facility.

In late February or early March 1990, IBM officials had their initial contact with Clayton & Dubilier, the company which ultimately purchased its Lexington facility. During the last week of March 1990, IBM officials had an introductory meeting in New York with Clayton & Dubilier. On April 19, 1990, Clayton & Dubilier made a presentation to IBM officials at its Lexington facility

regarding its interest in purchasing the Lexington facility. Negotiations then began between IBM and Clayton & Dubilier, and it was understood by both sides that the number of employees at the Lexington facility would have to be further reduced in order to successfully negotiate a sale.

Consequently, in late April 1990, IBM officials began considering how it could reduce the number of employees at its Lexington facility so that it could successfully negotiate a sale of its Lexington facility to Clayton & Dubilier. One means discussed by IBM officials was an early retirement program providing benefits of two times separation pay plus $25,000.00; that is, IBM began discussing what was to become known as LTPP. Other means being discussed by IBM officials beginning in late April 1990 were two times salary plus $2,500.00, three times separation pay, and two times separation pay plus $20,000.00. These discussions continued through May and into June 1990.

On June 19, 1990, an IBM task force decided that it would recommend to IBM's mnagement committee that the LTPP be offered to employees at IBM's Lexington facility. The task force decided to further recommend that LTPP not be retroactive to employees at the Lexington facility who had accepted one of the VTP programs. The IBM management committee adopted the task force's recommendation regarding LTPP on July 12, 1995, and on August 1, 1990, LTPP was announced and offered to employees at IBM's Lexington facility.

Based on these facts, the Magistrate Judge finds that no reasonable trier of fact could conclude that IBM gave "serious consideration" to offering LTPP to employees at its Lexington facility until April 19, 1990. The fact that IBM was seriously considering other benefit plans at this same time, and that IBM did not actually decide to offer LTPP until July 12, 1990, does not dictate a finding that serious consideration of offering LTPP oc-

cured at a date after April 19, 1990. *See Berlin*, 858 F.2d at 1159-60. It was at this point in time (i.e., April 19, 1990) that IBM began seriously considering offering LTPP to employees at its Lexington facility, and, therefore, it was at this point that its duties under ERISA with regard to such consideration commenced.

Similarly, but on the other end of the spectrum, the fact that a benefit plan offering two times separation pay plus $25,000.00 had been mentioned by at least one or more IBM officials beginning back in November, 1989, does not dictate a finding that serious consideration of offering LTPP occurred at a date before April 19, 1990. Unlike the VTP programs, which were offered to generally reduce the number of IBM's employees company-wide, including its Lexington facility, LTPP was a costly undertaking specifically offered by IBM to reduce the number of employees at its Lexington facility so that it could hopefully negotiate a sale of that facility to Clayton & Dubilier. The Magistrate Judge finds no evidence that, prior to Clayton & Dubilier's offer, IBM was *seriously considering* offering or implementing such a costly undertaking as a means by which to generally reduce the number of employees at its Lexington facility specifically, or all of its facilities generally. In other words, had Clayton & Dubilier not expressed an interest in purchasing IBM's Lexington facility, the Magistrate Judge finds no evidence on which a reasonable trier of fact could conclude that IBM, in its continuing concern and effort to reduce the number of its employees company-wide, would have offered LTPP to any of its employees, whether they be at its Lexington facility or any of its other facilities.

As IBM was not seriously considering offering LTPP to employees at its Lexington facility until April 19, 1990, which is a date outside the eligibility periods for the VTP-1, VTP-2, and VTP/LOA programs, IBM had no duty towards the plaintiffs with regard to the offering of LTPP. *See Berlin*, 858 F.2d at 1164; *Drennan*, 977

F.2d at 252 ("[I]t was GM's serious consideration of the plan . . . that triggered its fiduciary duties"). Therefore, the plaintiffs' allegations that IBM, through its officials, supervisors, and literature, made misrepresentations between September 28, 1989, and March 31, 1990, regarding the future availability of LTPP are immaterial. IBM's Motion for Summary Judgment should be granted, and the plaintiffs' Motion for Summary Judgment should be denied.

IV

For the reasons stated,

IT IS RECOMMENDED that the plaintiffs' Motion for Summary Judgment, (DE 155), be DENIED, and that the defendants' Motion for Summary Judgment, (DE 158), be GRANTED.

The Clerk of the Court shall forward a copy of this Proposed Findings Of Fact And Recommendation to the respective parties who shall, within ten (10) days of receipt thereof, serve and file timely written objections to the Magistrate Judge's Proposed Findings Of Fact And Recommendation with the District Court or else waive the right to raise the objections in the Court of Appeals. 28 U.S.C. section 636(b)(1)(B); *Thomas v. Arn*, 728 F.2d 813 (6th Cir. 1984), *affimed*, 474 U.S. 140 (1985); *Wright v. Holbrook*, 794 F.2d 1152, 1154-55 (6th Cir. 1986). A party may file a response to another party's objections within ten (10) days after being served with a copy thereof. Fed.R.Civ.P. 72(b).

This the 28th day of July, 1995.

/s/ James B. Todd
JAMES B. TODD
U.S. Magistrate Judge

Date of Entry and Distribution:

APPENDIX D

STATUTORY PROVISIONS

29 U.S.C. § 1001. Congressional findings and declaration of policy

* * * *

(b) **Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries.** It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligations for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with

such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

* * * *

APPENDIX E

PERSONAL & CONFIDENTIAL

IBM Vice President and
AGM,
Market Development
US Marketing & Services
72/3WY, Valhalla, NY
(914) 749-3100; T/L
777-3100
PROFS ID: RHQVM01/
RCLARK
DEPT. ID: RHQVM01/
JVURA
June 14, 1990

MEMORANDUM TO: Mr. W. J. Colucci

SUBJECT: Incentive Program In Lexington

Bill, as we discussed a week ago, I am *very* concerned about the backlash in Boulder relative to the proposed incentive program in Lexington.

I am convinced that of the 700 or so people who either moved or took the VTP, most of them would feel cheated and mistreated if the Lexington program is implemented as planned.

While I understand the difference in the size of the problem and the nature of the business transaction, each individual in Boulder looks at it as the same situation that they faced:

—My job is no longer needed.

—I must either leave the company or move to an unfavorable location.

—If so, why should I have VTP and someone in Lexington have 2X or more. They will remember

> that they were told: We're not going to do what we did in Tucson or Boca anymore—"it's too expensive. The VTP is as good as it's going to get."

Given this, I believe we will have *hundreds* of people who will open door or speak up and have *some* level of a publicity problem with which to deal. (No one has suggested a legal or IR threat of a convincing nature.)

In addition, after a long period of working the expectation down to a point where people believe VTP is "as good as it's going to get," we'll have a long road to reestablish that again. This was the key to our level of success with VTP this year.

The only answer I have for Lexington is—do it the way we did in Boulder. A sweet deal will have a high price on our people's trust and confidence in IBM and will clearly raise the price of future downsizing.

/s/ R. W. Clark
R. W. CLARK

/mi

cc: Mr. G. R. Conrades
Mr. N. C. Lautenbach
Mr. T. R. Lautenbach